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LABOUR & E. S. I. DEPARTMENT

NOTIFICATION

The 27th November 2014

No. 9794—IR(ID)-57/2013-LESI.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 20th November 2014, in Industrial Dispute Case No. 4/2014 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the Industrial Dispute between the management of Xavier Institute of Management, Xavier Square, Bhubaneswar and its workman Shri Gadadhar Barik was filed by the workman for adjudication is hereby published as in the Schedule below :—

SCHEDULE

IN THE INDUSTRIAL TRIBUNAL

BHUBANESWAR

INDUSTRIAL DISPUTE CASE No. 4 of 2014

Dated the 20th November, 2014

Present :

Shri. B. C. Rath, O.S.J.S.(Sr. Branch),
Presiding Officer, Industrial Tribunal,
Bhubaneswar.

Between :

The Management of Xavier Institute of Management, Xavier Square, Bhubaneswar-751 023 . . First Party—Management

And

Its Worksman Shri Gadadhar Barik, S/o Shri Haribandhu Barik At/P.O. Kaipadar, Dist. Khurda . . Second Party—Workman

Appearances :

Samhita Das, Legal Officer	. .	For the First Party—Management
Shri G. Barik	. .	For the Second Party—Workman himself

AWARD

The Government of Odisha in the Labour & E. S. I. Department in exercise of powers conferred upon it by sub-section (5) of Section 12 read with Clause (d) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (for short, 'the Act'), have referred the following dispute for adjudication by this Court vide their Letter No. F. No.14572500012014 order No. 2937/LESI., dated the 28th March 2014 :—

> "Whether the action of the management of Xavier Institute of Management, Bhubaneswar in terminating the service of Shri Gadadhar Barik, Library Attendant with effect from the 16th February 2005 is legal and/or justified ? If not, to what relief Shri Barik is entitled ?"

2. The case of the second party workman as narrated in his claim statement, in brief, is that he was serving as a Library Attendant under the first party management since 1994 and while continuing so during the year 2004 he suffered from Peptic Ulcer. Due to such ailment as he could not attend his duty from the 12th December 2004 he intimated such fact to his authority over phone and also through a Fax massage and subsequently made a written representation on 5thJanuary 2005 annexing therewith the medical papers with a prayer for extension of his leave till recovery. In spite of such intimation the management issued him a notice dated the 1st February 2005, asking him to show cause by the 15th February 2005, as to why a major penalty should not be imposed on him for his aforesaid act and ultimately vide its letter dated the 16th February 2005, passed orders for his removal from service with effect from the 27th December 2004. It is stated in the claim statement that on rceipt of the removal order although the second party appraised the management about his health condition by way of written representations attaching therewith all his medical papers and ultimately on the 5th April 2005 approached the Management to allow him to join in his duty by revoking the order of removal, yet the Management did not consider his genuine difficulty for which he made an Appeal to the Chairman who also rejected his Appeal. According to the second party workman, his removal from employment is not only in gross violation of the norms indicated in Staff Service Rules, but also in complete disregard to the principles of natural justice, in as much as, before imposing such punishment no enquiry was conducted where he could have proved his genuine difficulty for non-attending his duties. The action of the Management being illegal and unjustified, the second party worrkman has prayed for his reinstatement in service. He has also claimed full back wages on account of the fact that from the date of his removal from employment he has not been gainfully employed elsewhere.

3. The first party management entered appearance and filed its written statement stating therein, *inter alia*, that the case is not maintainable on account of the fact that the Institution of the Management is not an 'Industry' and the second party is not a 'workman' as defined under the Act. In this connection, the specific stand of the Management is that the workman was appointed in a supervisory capacity drawing wages exceeding Rs.1600 per mensem and as such he is not a 'workman' coming under the definition of Section 2(s) of the Act and similarly, the first party Institution being a Charitable Organisation is precluded from the definition of 'industry' as defined under Section 2(j) of the Act.

Admitting about the employment of the second party under it from the 1st August 1994, it is stated in the written statement that since the second party workman is in habit of remaining unauthorised absent from duty on several occasions and despite warnings and minor punishments imposed on him he did not change his attitude and from the 12th December 2004 he remained unauthorisedly absent from duty without submitting any leave application, therefore, the management after issuing several show-causes took a decision for his removal from service with effect from the 27th December 2004 as per the provisions contained in Rule 11.6(e) of the XIM Staff (Recruitment & Conditions of Service) Rules, 1993 (for short, 'Staff Service Rules'). According to the Management, the punishment imposed on the second party being in consonance with the provisions contained in the Staff Service Rules and Appeal preferred on such punishment having been rejected by the appropriate Authority, he is not entitled to any relief in the present proceeding.

4. Basing on the pleadings of the parties, the following issues have been framed :—

ISSUES

(i) Whether the action of the Management of Xavier Institute of Management, Bhubaneswar in terminating the service of Shri Gadadhar Barik, Library Attendant with effect from the 16th February 2005 is legal and / or justified ?

(ii) If not, what relief Shri Barik is entitled to ?"

(iii) Whether the case is maintainable under the provisions of the I. D. Act ?

5. To substantiate their respective stand, both parties have adduced oral as well as documentary evidence. While the second party workman examined himself as W. W. No. 1 and filed and proved documents marked Exts. 1 to 8, the first party management examined four witnesses on its behalf and filed and proved documents marked Exts. A to N.

FINDINGS

6. *Issue No. iii*—This issue is taken up first for consideration as the first party Management has strenuously urged that the reference is not maintainable owing to the fact that its Institution is not an 'Industry' and so also the second party is not a 'workman' as defined under th Act.

It is argued that the first party is a Charitable Educational Institution registered under the Socities Registration Act and further foreign contributions received in the Institution being charity in nature, it is precluded from the definition of 'Industry'. This argument is not at all tenable on the face of the evidence available on record. M. W. Nos 1, 2 and 3 have all admitted in their cross-examination that the Institution of the first party management is not giving free eduation and it is accepting fees from the students. The Administrative Officer examined on behalf of the management as M. W. No. 2 has clearly admitted in his cross examination that there is no certificate to show that the management is a Charitable Institution. Taking into consideration the evidence available on record and the *ratio* laid down by the Hon'ble Supreme Court in the case of Bangalore Water supply and Sewerage Board *Vrs.* A. Rajappa, reported in (1978) 2 SCC (L&S) 213 to the effect that University of Educational Institution would also fall under the definition of 'Industry', this Tribunal holds that the first party Managment is an 'Industry'.

Next it is contended on behalf of the Management that in view of supervisory nature of job performed by the second party with a remuneration of more than 1600 per mensem he cannot be regarded as a 'workman' and consequently his grievance cannot be adjudicated in this forum. It is well settled that basing on the designation of an employee or the remuneration attached to such designation th status of an employee cannot be decided. The determinative factor is the main duties of the concerned employee and not some works incidentally done. In the case in hand the second party was serving under the Management as a Library Attendant. The Management who is supposed to prove the supervisory nature of duties, if any, performed by the workman has not substantiated the same through evidence adduced before this Tribunal. In absence of any evidence that the second party being a Library Attendant was doing supervisory nature of duties, it is held that the second party is a 'workman'.

In view of the discussions made above, the case is held to be mainatainable. Issue No. iii is answered accordingly.

7. *Issue No. i*—It is not dispute that the second party workman was employed under the management with effect from the1st August 1994 and continued under the it for more than ten years i.e. up to 2004. It is also the admitted fact that the second party workman remained absent from his duty with effect from the12th December 2004 and ultimately vide letter dated the 16th February 2005 he was intimated that his services are no more with effect from the 27th December 2004 forenoon. The second party workman challenges such action to be illegal, arbitrary and unjustified on the ground that his absence from duty was on account of his ailment for which he has furnished leave applications as well as medical papers but the first party Management without considering the same has inflicted on him the extreme punishment of removal from job in clear contravention of the principles of natural justice and the provisions contained in the Staff Regulation. No departmental proceeding/enquiry was held to ascertain whether his absence from duty was on account of his illness or it was a deliberate one amounting to misconduct. No opportunity of hearing was afforded to him before terminating his service. The first party Management, on the other hand, refuting such assertions of the second party has stated that the plea of his ailment with effect from the 12th December 2004 is not acceptable on account of the fact that the FAX message dated the 21st December 2004 received by the management indicates that the leave prayed for by the workman with effect from the 12th December 2004 was due to his son's illness. Further stand of the Managment is that despite issuance of show-causes when the second party workman did not reportto duty, by resorting to the provisions of Rule 11.6 of the Staff Service Rules, 1993 the Management terminated his employment by treating his absence as cessation of employment with effect from the 27th December 2004. Filing a Xerox copy of the orders dated the 14th August 2007 passed in W. P.(C) No. 4086 of 2007 submission has further been advanced that pursuant to the direction of the Hon'ble Court the Appeal preferred by the second party workman against the order of his termination was turned down by the Chairman of the Organisation after giving due opportunity to him and in that view of the matter no illegality or irregularity has been committed by the first party Managment in treating the workman's unauthorised absence as cessation of employment and accordingly terminating his service with effect from the 27th December 2004.

8. Undisputedly, no departmental proceeding or enquiry was initiated against the second party workman before terminating his service. Further, it is emerging from the pleadings of the parties

that the Management while removing the second party from employment has followed the procedure stipulated in Rule 11.6(e) of its Staff Service Rules which reads as under :—

> "Habitual absence without leave or absence without leave for more than five consecutive days or overstaying leave sanctioned without sufficient or satisfactory grounds, provided that the concerned employee has overstayed sanctioned leave or has otherwise remained absent without permission or even intimation beyond a period of more than 15 days, it will be deemed that the concerned employee has resigned and accordingly he/she will cease to be in the employment of the management with effect from the date of expiry of 15 days counted as above."

On a careful reading of the above provision it can be safely be inferred that a person remaining absent from duty without permission or intimation beyond a period of more than fifteen days will be deemed to have resigned and in that case the Management can term his absence as 'cessation of employment' only. Coming to the case at hand it is emerging from the oral testimony of the workman and documents relied on by him i.e. Exts.2, 4 and 6 as well as the documents filed and relied upon by the first party workman had sought permission to extend his leave assigning reasons thereof. No specific pleading and evidence have been advanced by the management to show or to establish that the management was totally in dark about the absence of the workman from duty and they were not informed about the reason of such absence of the workman. On the other hand, it is emerging that there was communication/correspondences between the worrkman and the management about the non-attendance of the workman to his duty. Had there been no intimation or communication between the parties about such absence from duty extending to a period of more than fifteen days it would have been deemed that the workman had resigned from service and accordingly the matter could have been treated as a cessation of employment as contemplated under Rule 11.6(e) of the Staff Service Rules and in that case it can be held that the termination of service of the workman could be made without holding a departmental proceeding on the ground of cessation of work. As the second party workman had intimated and applied for leave for his absence either on the same day or within a period of fifteen days of his alleged unauthorised absence, a duty was cast upon the management to initiate a departmental proceeding to arrive at a conclusion that the absence from duty of the second party workman was intentional and unauthorised and the same was not related to any unforeseen contingency for which a man may be compelled to remain absent from his duty.

9. Rule 20.1 of the Staff Service Rules of the Management provides as follows :

> "No order imposing a major penalty shall be passed except after an enquiry is held, as far as may be, in the matter hereinafter provided."
>
> xx xx xx xx xx xx xx xx

The punishment of removal from service imposed on the second party workman is undoubtedly a major penalty. Even though Exts. A/1, A/2, A/3, B, B/1 and B/3 may lead to an inference that the second party workman was in habit of remaining absent from duty unauthorisedly for which he was earlier time and again asked to submit his explanations/show causes for such unauthorised absence, the first party managemnt was required to hold an enquiry to arrive at a conclusion that the absence

of the second party workman from duty was unauthorised before imposing a major penalty on him in view of the specific provision in its Staff Service Rules that no major penalty shall be imposed except after an enquiry is held in the matter. It cannot be over sighted that as per the settled principles or law, termination of an employee's service must be preceded by a proper domestic enquiry held in accordance with the Rules of natural justice i.e. due opportunity of being heard should be afforded to the employee before imposing a major penalty on him.

The Staff Service Rules also provides that for imposition of a major penalty there should be an enquiry into the acts alleged against the employee. In the case in hand, before putting an end to the service of the second party workman neither the management has followed its own Service Rules nor adhered to the principles of natural justice. Besides, the stand taken by the first party management that by resorting to Rule 11.6(e) of the Staff Service Rules it has put an end to the service of the second party is not at all acceptable in view of the categorical pronouncement of the Hon'ble Apex Court in a catena of decisions including the one in the case of D. K. Yadav *Vrs.* J. M. A. Industries Ltd., reported in (1993) II LLJ 696(SC) wherein their Lordships in Para.14 have held as follows :—

> "It is thus well settled law that right to life enshrined under article 21 of the Constitution would include right to livelihood. The order of termination of the service of an employee/ workman visits with civil consequences of jeopardising not only his/her livelihood but also career and livelihood of dependents. Therefore, before taking any action putting an end to the tenure of an employee/workman fair play requires that a reasonable opportunity to put forth his case is given and domestic enquiry conducted complying with the principles of natural justice. xx xx xx xx xx"

The Hon'ble Apex Court have further held in the aforesaid decision that the principles of natural justice must be read into the Standing Orders,otherwise it would become arbitrary, unjust and unfair violating Articles 14 of the Constitution. In view of the observations of the Hon'ble Supreme Court, this Tribunal is of the opinion that even if there is a clause in the Staff Service Rules for automatic cessation of employment of an employee for his remaining absent from duty for a peiod of more than fifteen days, the management is required to adhere to the principles of natural justice before doing away the job of such an employee, or else such an action would be treated as unfair and arbitrary. At the cost of repetition it may be stated here that in the instant case No domestic enquiry has been conducted against the second party workman before terminating his service as per the stipulation in the Staff Service Rules and thus there has been complete non-adherence of the principles of natural justice. Even if the allegation of unauthorised absence is accepted, in sake of argument, the punishment of removal from service in the facts and circumstances of the present case also otherwise appears to be harsh and on the contrary it is apparently disproportionate to the misconduct alleged against the second party workman. In the back ground as stated above the action of the first party management cannot be held to be either legal or justified.

9. *Issue No.ii*—Issue Nos.1 and 3 having been answered against the first party management, the next question for consideration is what would be the relief to which the second party workman is entitled to.

Claim has been advanced on behalf of the second party workman for his reinstatement in service with full back wages on a contention that he is not in gainful employment elsewhere since the date of his removal from service and the punishment was not proper to the alleged misconduct in view of his service track. There was no allegation of unauthorised absence during his service tenure from 1994 to 2002. On the contrary, the first party management has vehemently opposed to the reinstatement of the second party workman and payment of back wages on a plea that the same would encourage indicipline in its organisation. Admittedly, no evidence has been adduced or brought on record to claim that the second party workman was a habitual absentee in his long tenure of service ranging from 1994 to 2002. There is also no other concrete and credential evidence to show that the workman is involved in any indiscipline activites in the office of the first party management. He was alleged to be unauthorised absent from duty with effect from the 12th December 2004 and it is apparent that when he tried to resume his duty his service was terminated on the ground of cessation of his employment with effect from the 27th December 2004. Taking into consideration the above facts and circumstances as well as the lenght of service of the workman, his unblemished performance under the first party for the period from 1994 to 2002 i.e. prior to the incident and his present age and claim of not being gainfully employed elsewhere, I am of the considred view that the second party workman should be reinstated in service and he be paid 20% of his back wages.

So far the claim of back wages is concerned, the settled principle mandates the Industrial Tribunal or the Labour Court to consider the totality of the circumstances as well as the conduct of workman. As it appears from the pleadings and evidence of the parties that even though the workman was intimated about his termination of service with effect from the 27th December 2004, he filed a complaint before the labour machinery on the 20th June 2011 i.e. after lapse of about six years. No material is brought on record to explain such delay for putting his grievance before the labour machinery or nothing is emerging to show as to why he kept mum till he approached the labour machinery in the year 2011. Having regard to the above facts and circumstances and totality of the case, in my considered view, it would be just and proper to award a compensation of Rs.30,000 (Rupees thirty thousand only) in lieu of back wages to the second party workman. Further, the period of absence of the second party workman be treated as leave without pay. Accordingly, it is ordered that the second party workman be reinstated with continuity of service and be paid compensation of Rs.30,000 (Rupees thirty thousand only) within a period of one month of the date of publication of the Award in the Official Gazette, failing which the second party workman will be entitled to full back wages from the expiry of the date line fixed for his reinstatement and interest @ 9% per annum on the compensation amount.

The reference is answered accordingly.

Dictated and corrected by me.

B. C. RATH
19-09-2014
Presiding Officer
Industrial Tribunal
Rourkela

B. C. RATH
19-09-2014
Presiding Officer
Industrial Tribunal
Rourkela

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By order of the Governor
M. NAYAK
Under-Secretary to Government

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